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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 485 //

UNITED STATES GYPSUM COMPANY,
Appellant,

— against —

UNITED STATES OF AMERICA; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

MOTION OF APPELLEE CERTAIN-TEED PRODUCTS CORPORATION, PETITIONER IN THE COURT BELOW, TO AFFIRM THE FINAL JUDGMENT AND DECREE OF THE DISTRICT COURT.

HERBERT W. HIRSH,
NORMAN A. MILLER,
135 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Certain-Teed Products Corporation.

Of Counsel:
GANSON PURCELL,
910 17th Street, N.W.,
Washington, D. C.

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Appellees.

MOTION OF APPELLEE CERTAIN-TEED PRODUCTS CORPORATION TO AFFIRM THE FINAL JUDGMENT AND DECREE OF THE DISTRICT COURT.

Certain-teed Products Corporation (hereinafter referred to as "Certain-teed"), a petitioner below, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to warrant further argument.

STATEMENT.

This is a direct appeal under Section 2 of the Expediting Act, 15 U. S. C. 29, and under Sections 1253 and 2101 of Title 28, U. S. C., from the final judgment and decree entered on December 9, 1954, by a District Court of three judges, specially constituted pursuant to Section 1 of the Expediting Act, 15 U. S. C. 28, modifying its final decree of May 15, 1951 on five petitions, including that of Certain-teed Products Corporation, a co-defendant with United States Gypsum Company (hereinafter referred to as "USG") and others in this Government antitrust suit.[1]

On July 6, 1954 the District Court, by Judges Kimbrough Stone and Eugene Worley, acting upon said petitions, delivered its opinion[2] (J. S. A. 13) and on December 9, 1954 entered its findings of fact (J. S. A. 63) and conclusions of law (J. S. A. 75) on the aforesaid petitions and issued its final decree (J. S. A. 80). A motion for a new trial made by United States Gypsum Company (hereinafter referred to as "USG" or "appellant") was denied by the Court on June 30, 1955 (J. S. A. 91) with accompanying memorandum (J. S. A. 92).

In its final decree of December 9, 1954 the Court, after determining that it had jurisdiction of the subject matter and of the parties, modified its decree of May 15, 1951 by

1. Other defendants in the Government action, described by USG as the "corporate appellees", National Gypsum Company, Ebsary Gypsum Company and Newark Plaster Company filed similar petitions for orders, modifications or directions for enforcement, construction or carrying out of the final decree of May 15, 1951, as did the plaintiff, the United States of America.

2. Judge William P. Cole, Jr. dissented, Appendix to Appellant's Jurisdictional Statement, p. 58. The Jurisdictional Statement is hereinafter designated as "J. S.", the Appendix to the Jurisdictional Statement as "J. S. A."

adding to Article V thereof[3] a paragraph reading as follows:

> "Defendant United States Gypsum Company is hereby ordered and directed to discontinue and to dismiss with prejudice to United States Gypsum Company, its pending actions as follows: against National Gypsum Company, in the United States District Court for the Northern District of Iowa; against Certain-Teed Products Corporation, in the same District Court; against Newark Plaster Company, in the United States District Court for the District of New Jersey; and against Ebsary Gypsum Company, Inc., in the United States District Court for the Southern District of New York." (J. S. A. 81.)

The suit which resulted in the final decree of May 15, 1951 was instituted by the United States in 1940 and has been before this Court on three prior occasions, 333 U. S. 364, 339 U. S. 959, 339 U. S. 960, 340 U. S. 76. (The last three mentioned decisions of this Court dealt with appeals by USG and the Government from the District Court's decree of November 7, 1949.) As a result findings were made that USG and five other corporations, including Certain-teed Products Corporation, and six individuals conspired to fix prices on patented gypsum board and unpatented gypsum products in violation of Sections 1, 2 and 3 of the Sherman Act, this Court noting that USG via license agreements maintained rigid control over the price and terms of sale of virtually all gypsum board (333 U. S. at 371) and controlled the sale of unpatented gypsum board and plaster

3. Article V enjoined defendants from (a) fixing prices for gypsum products by patent license agreements or other actions, (b) agreeing upon a basis for selection or classification of purchasers of gypsum products, (c) refraining to sell gypsum products to any purchasers or class of purchasers, (d) agreeing upon or quoting gypsum products pursuant to delivered price plans resulting in identical prices, and (e) policing, investigating, checking or inquiring into prices, quantities, terms or conditions of any offer to sell or sale of gypsum products (J. S. A. 7).

(333 U. S. 397) and acted in concert to eliminate an important class of jobbers (333 U. S. at 398). Pursuant to the mandate of this Court the District Court for the District of Columbia entered its final decree of May 15, 1951 where, *inter alia,* it was adjudged that each of USG's patent license agreements with its co-defendants "is unlawful under the antitrust laws of the United States and illegal, null and void" (Article IV, J. S. A. 6).

Following the first decision of this Court on March 8, 1948 voiding the patent license agreements, Certain-teed discontinued the payment of royalties to USG under its patent license agreement. It made no further payment of royalties until after the final decree of May 15, 1951 when for the first time Certain-teed was able to obtain a new patent license agreement free of illegal restraints (J. S. A. 65).

The District Court's final decree of May 15, 1951 followed a second decision of this Court admonishing the District Court, on the Government's appeal from the narrow scope of its earlier decree, that it should "cure the ill effects of the illegal conduct" 340 U. S. 76, 88 and that, "the conspirators should, so far as practicable, be denied future benefits from their forbidden conduct," 340 U. S. 76, 89. Consequently, the decree of May 15, 1951 expanded the relief earlier granted. It provided for compulsory licensing by USG at reasonable non-discriminatory royalty rates (Article VI; J. S. A. 7), contained the injunction described in note 3 above (Article V; J. S. A. 7), enumerated certain patent licensing agreements "and any supplement or amendment" thereof, including the agreement between Certain-teed and United States Gypsum Company (Article II; J. S. A. 5), and adjudged each of the license agreements listed in Article II as "unlawful under the anti-trust laws * * * illegal, null and void." (Article IV; J. S. A. 6.)

Despite the above decretal provisions, on March 11, 1953, USG commenced an action in the United States District Court for the Northern District of Iowa against Certain-teed, claiming royalties unpaid under the voided license agreement during the period from the Supreme Court's decision to the date of the final decree, in the amount of $650,000.[4] The suit was in five counts. Counts I and II expressly pleaded Certain-teed's liability for royalties in the amount of $650,000 on the license agreement which the decree made a nullity (J. S. A. 73). Count III also alleged Certain-teed's liability for $650,000 at the royalty rate fixed by the illegal agreement and is described in the Findings of Fact of the District Court as a "common law action of *indebitatus assumpsit* based on a pleaded express contract." (Id.) That contract and the relief sought are so stated as to bring about the identical recovery that would have been realized had the count been for recovery upon the royalties provided for in the illegal agreement (*Id.*). Count IV, also in the amount of $650,000 representing the same royalty, was found by the District Court to be a *quantum meruit* count covering the use of patents (*Id.*). Count V charged infringement by Certain-teed of the patent under which licensing rights had been granted to it by the voided agreement and damages are stated as $650,000, again by reference to the royalty rate found in the unlawful agreement (J. S. A. 53).

Proceedings in the Iowa suit were stayed upon the application of Certain-teed (J. S. 14), which thereafter

4. In January and February, 1953, U. S. Gypsum filed separate similar actions against three of the other defendant-licensees who had withheld payment of royalties; against National Gypsum Company in the Northern District of Iowa; against Newark Plaster Co. in the District of New Jersey; against Ebsary Gypsum Co. in the Southern District of New York. These suits were all based on the same theory of cause of action and were all in substantially similar form (J. S. A. 72), although as to the latter two companies the claim was for non-payment of royalties until the dates the complaints were filed.

petitioned the District Court for the District of Columbia to enjoin USG from continuing the Iowa action and from asserting any claim against Certain-teed for payment for use of USG's misused patents for any period of time prior to May 15, 1951, the date of the final decree in the anti-trust proceeding. Other licensees filed similar petitions, and the United States petitioned to enjoin USG from asserting any claim or suit "in whole or in part on any of the license agreements adjudged illegal, null and void by the final decree of this Court entered on May 15, 1951 or on any provision thereof." (J. S. A. 17-18.)

Briefs were filed by each of the petitioners, USG and the United States, and reply briefs were filed by the petitioners. Extensive oral arguments on January 12 and January 13, 1954, were made by all of the parties in interest and comprised 253 pages of reporter's transcript (USG Notice of Appeal, p. 10). The matter was then taken on briefs and oral argument by the Court, which filed its opinion on July 6, 1954 (J. S. A. 13). The majority opinion of 38 pages, considered in detail all of the matters presented by the parties. Thereafter, a motion for a new trial was made by USG and briefs were filed in connection therewith by all of the parties. A full day's oral argument was had by the Court on the motion for a new trial on April 6, 1955, requiring 178 pages of reporter's transcript (USG Notice of Appeal, p. 12).

On these facts the District Court for the District of Columbia concluded that USG should be enjoined from further prosecuting the first two counts of its suit since in asserting them the defendant "clearly violate(d) the express provisions of Article IV" (J. S. A. 77)—the provision of the final decree which declared the patent license agreement to be null and void. The District Court further concluded that since Article IV of the final decree did not expressly or impliedly cover the counts for *indebitatus*

assumpsit, for infringement, or for *quantum meruit*, it would modify the decree in order to enjoin prosecution of such counts (J. S. A. 78-79). The Court pointed out that the "purpose and permissible function of an order for modification of an anti-trust decree is to cover something within the broad purposes of the decree but which, for some proper reason, was not included in the existing decree." (Id.) It noted that it had expressly reserved jurisdiction in Article X of the final decree "to take further action, if experience thereafter should make such necessary or advisable, fully to effectuate the purposes of destroying the monopoly and conspiracy and denying the fruits thereof." (*Id.*) The Court also concluded that in addition to its expressly reserved power in the final decree, as a Court of Equity it had inherent power to modify its decrees "so as to make them fully effective, provided, however, that the decree may not be enlarged beyond its intended proper scope." (J. S. A. 78.) It further concluded that USG had not at any time prior to May 15, 1951, purged itself of its patent misuse and consequently "should be enjoined from further prosecution of all Counts." (*Id.*) It stated that to "allow prosecution of these suits would weaken the effectiveness of the Final Decree" and "*because of the practical and legal situation in this case*, and also the teaching in the *Hartford-Empire* case" (emphasis added) it enjoined their further prosecution. (J. S. A. 78-79.)

Since Certain-teed accepted a license from USG as of May 15, 1951 issues relating to misuse and purge after that date are not pertinent to this motion. Therefore, although Certain-teed believes the decree of December 9, 1954 to be proper in its entirety, the following argument is addressed only to the matters raised in Certain-teed's petition.

ARGUMENT.

A. The Decision of the District Court Is Correct and No Substantial Questions Are Presented.

The decision of the District Court is manifestly correct. That Court had been instructed by this Court to grant relief which will "so far as practicable cure the ill effects of the illegal conduct * * *" 340 U. S. at pp. 88-89. It was confronted with an unrepentant flouting of the decree of May 15, 1951, and a bold attempt to subvert its effectiveness. On the petitions of all the interested parties the Court took the only possible measure which might preserve the dignity and integrity of its final decree. It did so only after elaborate briefing and argument on the issues, including a hearing on a motion for a new trial. With reference to the motion for a new trial, the District Court said:

> "*Per Curiam:* The function of a motion for a new trial is to direct the attention of the Court to matters in the opinion of the trial court, in its finding of fact or in its conclusions of law, which counsel regard as having resulted in an erroneous judgment. Here, counsel for the various parties have ably presented or opposed the present motion.
>
> "Although the merits of these petitions by the Government and the other petitioners were exhaustively discussed and determined, in majority and dissenting opinions, and the settlement of Finding and of the Conclusions and the form of judgment had been painstakingly considered by this Court heretofore in the light of extended invited suggestions from counsel, we have not deemed this present motion as merely a necessary formal step in the progress to a final determination by the Supreme Court. Not only have we

listened to the excellent oral arguments on this motion but we have carefully read and studied the complete transcript of that hearing as well as all of the matters brought to our attention therein." (J. S. A. 92-93.)

As shown by the foregoing and the Statement, pages 2 to 8 hereof, it is clear that all of the contentions on which USG here relies were carefully and fully considered by the District Court and rejected by that Court.

B. The Injunction Entered by the District Court Is an Appropriate Remedy.

To protect its decree and implement its general purpose the District Court employed the traditional and well established procedure of enjoining a multiplicity of actions in other Courts which would derogate from its continuing powers to supervise the operation of its own decree. *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 289-291 (1937); *In re Georgia Power Co.*, 89 F. 2d 218, 221 (5th Cir., 1937), cert. denied 302 U. S. 692 (1937); *Crosley Corp.* v. *Hazeltine Corp.*, 122 F. 2d 925, 929-930 (3d Cir., 1941), cert. denied, 315 U. S. 813 (1942).

In *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180 (1952), this Court upheld an inter-federal court's injunction in a patent infringement case, saying at pp. 183-184:

> "Wise judicial administration giving regard to conservation of judicial resources, and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion appropriate for disciplined and experienced judges, must be left to the lower courts."

See also, *Chicago Pneumatic Tool Co.* v. *Hughes Tool Co.*, 180 F. 2d 97 (10th Cir., 1950); *Milwaukee Gas Spec. Co.* v. *Mercoid Corp.*, 104 F. 2d 589 (7th Cir., 1939); *Cold Metal Products Co.* v. *Crucible Steel Co.*, 126 F. Supp. 546 (D. N. J., 1954); *Yocum* v. *Philadelphia Arena, Inc.*, 96 F. Supp. 329 (E. D. Pa., 1951); *Independent Pneumatic Tool Co.* v. *Chicago Pneumatic Tool Co.*, 74 F. Supp. 502 (N. D. Ill. E. D., 1947); *F. X. Hopper Co. Inc.* v. *Samuel M. Langston Co.*, 56 F. Supp. 577 (D. N. J., 1944); *Godfrey L. Cabot, Inc.* v. *Binney & Smith Co.*, 46 F. Supp. 346 (D. N. J., 1942).

The District Court's injunction against continuance of the Iowa action applied a judicial remedy now established in patent anti-trust actions. Landmark cases in which the patentee has been enjoined from enforcing patent rights misused under the anti-trust laws are: *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 418-419 (1947); *United States* v. *National Lead Co.*, 63 F. Supp. 513, 534 (S. D. N. Y., 1945), affirmed 332 U. S. 319 (1947). In both the *Hartford* and *National Lead* cases defendant-licensors were enjoined from bringing any infringement suits for royalties under their misused patents for any period of time prior to the entry of the decree. This Court has noted that the violations of law in the *National Lead* case "were as offensive to the prohibitions of the Sherman Act as those proven in the present case" 340 U. S. at 93-94. Recent lower Court decisions have applied the teaching of these cases so that it is now often provided in anti-trust decrees that patentees misusing their patents under the anti-trust laws are enjoined from asserting infringement or other rights under their patents until the effects of their violations can be shown to have been fully dissipated. *Kobe, Inc.* v. *Dempsey Pump Co.*, 97 F. Supp. 342 (N. D. Okla., 1951), affirmed 198 F. 2d 416 (10th Cir., 1952), cert. denied 344 U. S. 837 (1952); *Apex Electrical Mfg. Co.*

v. *Altorfer Bros. Co.*, 130 F. Supp. 152 (S. D. Ill. N. D., 1955); *United States* v. *Vehicular Parking, Ltd.*, 56 F. Supp. 297, 61 F. Supp. 656 (D. Del.).

C. The Modification of the District Court's Decree Was Within Its Discretion; It Had Inherent Power to Modify Its Decree.

The action of the District Court fell well within the scope of its discretionary powers. Litigation like everything else must have an end, and this case has already been before this Court on three occasions.[5] The District Court had a broad power to modify and reshape its injunction. In *Chrysler Corp.* v. *United States*, 316 U. S. 556 (1942), Mr. Justice Byrnes stated:

> "It is clear that under paragraph 14 of the original decree the District Court had jurisdiction to modify it. The question is whether the change in date in paragraph 12 amounted to an abuse of this power to modify. We think that the test to be applied in answering this question is whether the change served to effectuate or to thwart the basic purpose of the original consent decree. *United States* v. *Swift & Co.*, 286 U. S. 106."

In *United States* v. *Crescent Amusement Co.*, 323 U. S. 173 (1944), Mr. Justice Douglas said, at p. 187:

> "* * * where the findings of violations are sustained, we will not direct a recasting of the decree except on a showing of abuse of discretion."

In *Associated Press* v. *United States*, 326 U. S. 1 (1945), Mr. Justice Black, writing for the Court, at p. 22, said:

> "The fashioning of a decree in an antitrust case in

5. USG has included in its record on appeal almost the entire record of all prior proceedings in this matter as if in an attempt to reargue once again issues long since put to rest.

such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court."

In *United States* v. *National Lead Co.*, 332 U. S. 319 (1947), Mr. Justice Burton said, at p. 334:

"In our opinion, the provisions of this decree, to a large extent, are matters lying within the discretion of the District Court as a court of equity whose duty it was to make the remedy as effective as possible. We believe that the District Court has not exceeded its discretion in the provisions of this decree."

In *International Salt Co.* v. *United States*, 332 U. S. 392 (1947), Mr. Justice Jackson said, at pp. 400-401:

"The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case."

The most recent pronouncement of this Court on the scope of review of anti-trust decrees is found in *Besser Mfg. Co.* v. *United States*, 343 U. S. 444 (1952); in that case the Court said:

"In framing relief in anti-trust cases, a range of discretion rests with the trial judge. *United States* v. *National Lead Co., supra,* at 338; *International Salt Co.* v. *United States, supra,* at 400-401, 405; *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185. We can see no abuse of discretion here."

It is noteworthy that the language of this Court in the *Gypsum* case in 1950, 340 U. S. 76 at p. 89, upon which USG relies (J. S. 25) and which tends to delimit the trial court's discretionary power in anti-trust decrees[6] is not

6. In *Gypsum* this Court, however said:
"The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court. This has been repeatedly recognized by us." (340 U. S. at p. 89.)

referred to in the subsequent *Besser* decision which reasserts the predominant thinking of this Court.

Certainly this Court has left open some area for the operation of a trial court's discretion in framing relief in antitrust cases. We submit that, as hereinafter shown, the modification by the District Court met this Court's test of proper exercise of discretion which is "whether the change served to effectuate • • • the basic purpose of the original • • • decree." *Chrysler Corporation* v. *U. S.*, 316 U. S. 556; *United States* v. *Swift & Co.*, 286 U. S. 106 (1932).

After extensive arguments and briefing the lower Court handed down its opinion (J. S. A. 13-57), its findings of fact (J. S. A. 63-75), conclusions of law (J. S. A. 75-79) and entered its decree (J. S. A. 80-81) in which it determined that to effectuate its basic purpose the original decree must be modified.

In *United States* v. *Swift & Co.*, 286 U. S. 106, 114, this Court made it clear that the power to modify an antitrust decree inheres in a court of equity. In that case, this Court said:

> "Power to modify the decree was reserved by its very terms • • •. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery."

In the present proceeding, as in the *Swift* case, the District Court, in Article X of its Final Decree, explicitly reserved jurisdiction to deal with matters such as those raised by Certain-teed's petition.

D. Modification of the District Court's Decree Effectuated the Basic Purpose Thereof.

This power to modify a decree is not, to be sure, unlimited. *Chrysler Corporation* v. *United States,* 316 U. S. 556, 562. In the present proceeding the Court's exercise of its power to modify was clearly designed to effectuate the basic purpose of the original decree and consequently ought not to be reviewed. This Court had made it clear that the purpose of the decree which it directed the District Court to enter was

> "so far as practicable, [to] cure the ill effects of the illegal conduct, and assure the public freedom from its continuance * * * The conspirators should, so far as practicable, be denied future benefits from their forbidden conduct" 340 U. S. at pp. 88-89.

Modification of the decree specifically enjoining USG from enforcing its misused patents for the period prior to the entry of the final decree did no more than to apply and implement that purpose. See *Morton Salt* v. *Suppiger,* 314 U. S. 488, 491; *Westinghouse Electric Corp.* v. *Bulldog Electric Products Co.,* 179 F. 2d 139 (4th Cir. 1950); *McCullough* v. *Kammerer Corp.,* 166 F. 2d 759 (9th Cir. 1948), *cert. denied,* 335 U. S. 813 (1948); *Campbell* v. *Mueller,* 159 F. 2d 803 (6th Cir. 1947); *National Lockwasher Co.* v. *George K. Garrett Co.,* 137 F. 2d 255 (3d Cir. 1943).

The modification merely made explicit that which necessarily must have been implied if Article IV of the decree declaring the patent license agreements nullities were to have purpose or effect, and it aborted USG's attempt to subvert the decree, both directly through the counts on the illegal agreements, and, elsewhere[7] as the District

7. On the *indebitatus assumpsit* count.

Court found, through "a left-handed, indirect method." (J. S. A. 78.)

Even greater reason attaches for honoring the discretion of the trial court in modification of a litigated decree than in the "molding" of the initial decree, which this Court has called "this most significant phase of the case." *United States* v. *U. S. Gypsum Co.*, 340 U. S. 78, 89. Inappropriate provisions in the initial decree may defeat the great objective of the antitrust litigation "to restore future freedom of trade" (*Id.*). A modification of the decree designed to "effectuate" rather than "to thwart the basic purpose" of the original decree (see *Chrysler Corp.* v. *United States*, 316 U. S. 556, 562) is an action which cannot defeat the public interest in the litigation, and as to its need the trial court with intimate knowledge of the record will have particular competence. The lower court does no more than mold its decree to accommodate a change in circumstances.

As this Court recently said, "necessarily an ample degree of discretion appropriate for disciplined and experienced judges must be left to the lower Courts." *Kerotest Manufacturing Co.* v. *C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183-184. If every review of modification of an antitrust decree designed to implement its purpose were to be heard by this Court, there would be a torrent of unnecessary and stultifying appellate activity. Importance of the outcome merely to the parties should not be enough to activate this Court. *Cf. Layne & Bowler Corp.* v. *Western Well Works Inc.*, 261 U. S. 387, 392-3 (1923); *United States* v. *Rimer*, 220 U. S. 547, 548 (1911); *Murdock* v. *Memphis*, 20 Wall. (87 U. S.) 590, 628 (1875). And *cf.* Mr. Justice Frankfurter concurring in *Stainback* v. *Mo Hock Ke Lok Po Corp.*, 336 U. S. 368, 385 (1949); *Wilkerson* v. *McCarthy*, 336 U. S. 53, 66-67 (1949).

USG suggests that substantial questions exist because:

(1) the District Court erroneously found continued patent misuse through misapplication of the teaching of *Hartford-Empire Co., et al.* v. *United States,* 323 U. S. 386, 324 U. S. 570 (J. S. 19);

(2) the District Court found patent misuse in USG's effort to enforce the royalty provisions of the voided patent license agreements in counts of its suits against its licensees when the Court could have disregarded these deliberately and explicitly pleaded counts by application of Rule 8 of the Federal Rules of Civil Procedure (J. S. 22);

(3) the District Court's finding of continued patent misuse conflicts with Title 35, U. S. C. Sect. 271 (d) (J. S. 24); and

(4) the District Court's exercise of discretion is reviewable by this Court (J. S. 25).

USG also asserts without discussion that the decree of the District Court is inappropriate "for disposing of the misuse and purge issues as a matter of law and without the taking of any evidence" (J. S. 25-26). We consider first the issues of purge and misuse and thereafter discuss the other questions raised by appellant.

E. The District Court Properly Held That USG Had Not Purged the Misuse of Its Patents.

Certain-teed did not pay royalties for any part of the period from April 1, 1948 (because of this Court's decision on March 8, 1948) until May 15, 1951, the date of the final decree of the District Court. The District Court found that USG had not purged its misuse of patents (J. S. A. 70). The pertinent question, therefore, on Certain-teed's petition, is whether the trial Court as a matter of law could have decided the question of purge for this period without the taking of evidence relating thereto. The District Court had before it a claim of purge taking place

during a twenty-five month span while the proceedings were mostly either before this Court on appeal or the District Court for reconsideration. It would have been exceedingly difficult for USG to have taken the steps required to purge itself until the District Court issued its final decree adjudicating the illegality of the conduct and providing for the injunctive relief necessary to cure it. Further, since the decree of November 7, 1949 was greatly enlarged as a result of the decision of the Supreme Court on November 27, 1950 (340 U. S. 76), had a purge of the conduct proscribed by the earlier decree taken place it necessarily would have fallen vastly short of satisfaction of the May 15, 1951 decree.

The District Court, upon consideration of USG's five factual claims of purge, reached the conclusion that the effects of the patent misuse remained undissipated, finding that "neither taken separately nor cummulatively do any or all of these matters amount to evidence of purge by USG of its misuse of its patents" (J. S. A. 72). The course of conduct of USG as "clearly shown by the proceedings of record in the Anti-trust case and in these suits by USG (J. S. A. 78) constituted the "practical and legal situation in this case" which required modification of the decree and it was only alternatively because of the "teaching in the *Hartford-Empire* case" that the District Court ordered modification of the final decree (J. S. A. 78-79).

USG advances no cogent reason why this Court should review the District Court's finding that USG's factual claims cannot amount to a purge in law. A glance at this Court's decision at 333 U. S. 364 shows that USG's wrong was not limited to illegal price-fixing, but as the Court below found, that restraint was "inseparably joined with the other provisions found violative of the Act." Consequently, with reference to its first claimed act of purge—the tentative

notice sent to its licensees while litigation was pending that USG would suspend price fixing "until we decide again to exercise our right to do so" (J. S. A. 70)—cannot amount to more than a grudging attempt to cure but part of its illegal activity.[8] Secondly, a claim of purge was bottomed on USG's asserted acquiescence in its licensees' cessation of royalty payments. The suits to recover royalties under the agreement, and this appeal, show that the acquiescence, whatever operative legal meaning it might have had, never took place, or, having taken place, was abandoned in a deliberate effort to flout the decree (J. S. A. 54-55). A third claim was based on USG's proffer of license agreements in 1949 in new form. Since these agreements were not intended to become effective until entry of the District Court's decree, and differed from what this Court approved (340 U. S. 76), the proffer could have no effect until May 15, 1951 and cannot here be material (J. S. A. 71). Fourthly, a claim was made that USG determined it would not appeal the District Court's decision unless the Government appealed. USG in fact appealed on very different questions from those posed by the Government, and consequently this subjective nicety can have had no objective effect (*Cf.* 339 U. S. 959 with 339 U. S. 960). Finally, and curiously, USG relies in support of purge upon the Supreme Court's in-

8. The District Court said of this attempt:

"The first of these five is that USG did not fix prices, under its licenses, after July 8, 1941. This is true. However, its effect is dissipated by two considerations: first, the notices that minimum prices bulletins would be suspended included the statement that such suspension would continue 'until we decide again to exercise our right to do so';[16] and, second, this price fixing provision is inseparably joined with the other provisions found violative of the Act (*Edward Katzinger Co.* v. *Chicago Metallic Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Elec. & Mfg. Co.*, 329 U. S. 402)." (J. S. A. 54.)

16. The "potential power" (*Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458) remained.

junction of May 29, 1950 against its "enforcing in any manner whatsoever" the price provisions of the illegal license agreements which USG had at least tentatively abandoned (339 U. S. 960). The patent license agreements were illegal in their entirety[9] and had been stricken in their entirety before that decision of this Court, as they were again in the final decree which followed, but in defiance of these rulings USG launched the suits based on the agreements which were enjoined. The District Court found that "the USG suits now pending show conclusively * * * that even now it is striving to enforce the royalty provisions of the illegal patent license agreements." (J. S. A. 72). Certainly the Supreme Court's opinion of May 29, 1950 is the basis for a finding of violation, not support for a claim of purge.

On the very claims made there was, therefore, no need for the taking of testimony, since the maximum claimed if proved would have been insufficient in law to support the burden of proof which fell upon USG (*B.B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 498; See also *Park-In Theatres* v. *Paramount-Richards Theatres*, 81 F. Supp. 466, *United States* v. *Vehicular Parking, Ltd.*, 56 F. Supp. 297 and 61 F. Supp. 656).

F. The Teaching of the Hartford-Empire Case Was a Proper Precedent for the District Court's Decree.

It has already been noted that the District Court's reliance on "the teaching in the *Hartford-Empire* case" was but an alternative base for its decision bottomed on the "practical and legal situation in the case." (J. S. A. 78-79).

9. It was settled law in this Court before the decree that unlawful price-fixing provisions in patent license agreements are not severable from the license provisions for the payment of royalties. *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394, 401; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402, 407.

That decision of this Court, however, offered a solid precedent for the District Court's decree and its application to the facts at bar presents no important or substantial question. In the first *Hartford-Empire* opinion, 323 U. S. 386, this Court was faced for the first time with the problem of defining appropriate remedies for violations of the antitrust laws under an analogous factual and legal situation where there existed broad industry-wide restraints and monopolization through patent misuse. It provided for compulsory licensing at reasonable royalties for the post-decree period and an injunction against the assertion of infringement claims for the pre-decree period. The same remedy was adopted on similar facts in the *National Lead* case, 332 U. S. 319, affirming 63 F. Supp. 513. The basic teaching of *Hartford-Empire,* and obviously that on which the lower Court relied in the present proceeding, was that pre-decree infringement claims could be forbidden as well as compulsory licensing granted where patents have been misused under the antitrust law. Some of Hartford's licensees, however, paid their royalties during the period between the initial and final decrees to Hartford's receiver, who had been appointed, *inter alia,* "to prevent any further abuse of the patent privileges of Hartford", 46 F. Supp. 541, 620. These licensees who had paid royalties were, of course, not infringers during this period of time. Consequently the holding of the Supreme Court as to the disposition of the funds paid in to the receiver in no way constitutes a precedent for the disposition of the claims in the present proceeding and could not have furnished the "teaching" of the case, *i. e.,* compulsory licensing for the post-decree period and injunction against infringement claims for the pre-decree period, referred to by the lower Court (J. S. 20-21).

The treatment of ear-marked royalties in *Hartford-Empire* in no way subtracted from the precedent value of

that decision as to the propriety of enjoining actions for pre-decree infringement, and inaccurate descriptions of the meaning of that case (*cf.* J. S. 20-21 with the supporting reference there given: 323 U. S. 409, 415) or of the decision of the Court below (*cf.* J. S. 19 with J. S. A. 48-50) cannot create a substantial question.

G. Rule 8 of the Rules of Civil Procedure Has No Application to the Questions in Issue.

(a) The United States Did Not Take the Position That It Did Not Oppose USG's Suits Against Its Licensees.

(b) The Quantum Meruit Counts in the USG Suits Cannot Be Sustained.

USG's second claim to a pending substantial question is based upon an asserted failure of the lower Court to apply Rule 8 of the Rules of Civil Procedure in determining the meaning of USG's pleadings in its suits against the co-defendants (J. S. 22-24).

It is claimed by USG (J.S. 4) that "the Department of Justice does not oppose the suits filed by USG to recover reasonable compensation for use made by others of USG patents prior to entry of the final decree." Subsequently (J.S. 15), USG paraphrased the petition of the United States, stating that the petition prayed that the District Court hold as barred any recovery by USG in its compensation suits that was based on the license agreements that were judged illegal, null and void by Article IV of the Final Decree of May 15, 1951; that, however, the petition expressly stated that insofar as any compensation suits by USG asserted claims for the reasonable value of the use of USG patents or for due compensation for the infringement of such patents, the United States took no position whether such alternative claims

were barred by the Final Decree of May 15, 1951, or whether the District Court should enter an order enjoining USG from prosecuting such alternative claims.

Based on the foregoing statements of the Government's position, USG argues (J.S.A. 23 *et seq.*) that the Government has implicitly acknowledged the correctness of USG's contention that under the Rules of Civil Procedure in District Courts of the United States it was entitled to make its alternative claims for the reasonable value of the use of its patents or for compensation for the infringement thereof. We submit that neither the statement nor the contention of USG based thereon is correct. The Government at no time took the position that it did not oppose suits by USG to recover reasonable compensation for the use made of its patents prior to the entry of the final decree. In its petition, the Government prayed:

> "I. That this Court enjoin U.S.G. from asserting any claim, and from instituting, threatening to institute, or maintaining any action, *based in whole or in part* on any of the license agreements adjudged illegal, null and void by the final decree of this Court entered on May 15, 1951, or on any provision thereof." (Emphasis added.)

It was determined by the District Court that, under all of the facts and circumstances, to allow USG to recover on its alternative claims the exact amount claimed by it on the license agreements would be to render nugatory the provisions of the Decree of May 15, 1951, declaring the license agreements to be null and void; that, in effect, the alternative claims were only an indirect attempt to recover that which the final decree intended to prohibit.

The lower Court found that the counts on the voided license agreements violated the decree (J.S.A. 78) and that the counts *dehors* the agreement, were but an indirect

way of attempting to force a recovery which it was the purpose of the final decree to prevent (J.S.A. 78).

The propriety of modification of the decree does not stand or fall upon the District Court's interpretation of USG's pleadings. USG urges that because of Rule 8 of the Rules of Civil Procedure the District Court should have disregarded its pleading on the contracts voided by the antitrust decree. In effect USG claims that the deliberate acts of a sophisticated pleader ought to be disregarded. Nothing in Rule 8 which allows alternative claims for relief gives support to this startling suggestion.

Were there substance to the contention that the pleading should be disregarded, since the "final theory of recovery is for the Court rather than the pleader" (J.S. 23) it would prove too much and could only defeat USG's afterthought that the action sounds in theory other than contract (J.S. 24). All the counts were for sums computed on the contract base for royalties. (See p. 5, *supra.*) The *indebitatus assumpsit* count was found by the Court below to be "based on a pleaded express contract" (J.S.A. 73). The remedies available for patent infringement are wholly statutory[10] and have no common law basis. Consequently, *quantum meruit* and quasi-contractual actions cannot lie. *Gayler* v. *Wilder*, 51 U.S. 476, 493 (1850); *Bellavance* v. *Plastic-Craft Novelty Co.*, 30 F. Supp. 37 (D.C. Mass. 1939); *In re Paramount Publix Corp.*, 8 F. Supp. 644 (S.D.N.Y. 1934); *Schillinger* v. *United States*, 155 U. S. 163 (1894). In addition a quantum merit recovery is unavailable here because a transaction wholly illegal will not support such a claim; nor will this Court aid a plain-

10. A patentee may sue for damages for infringement at law or seek an injunction, accounting and damages in equity. 35 U. S. C. Sect. 281, 283, 284; *Ryan Distributing Corp.* v. *Coley*, 51 F. Supp. 377 (E. D. Pa. 1943), *aff'd* 147 F. 2d 138 (C. A. 3 1945), *cert. denied* 325 U. S. 859.

tiff who must prove a violation of law to prove his case. *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 748, 756 (1947). By mechanical elimination the Court below in determining the theory of the cause of action would have been left with three counts based on the contract and one for infringement. Under such circumstances it would have been an arbitrary, if not a fatuous, choice had the lower Court found that USG had pleaded merely an action for infringement.

H. Codification of the Patent Laws Does Not Support the Suits on the Void License Agreements.

USG also asserts (J.S. 24-25) that the trial Court's conclusion that a continuing misuse of patents during the pre-decree period conflicts with the recent codification of the patent laws, Title 35, U.S.C. Sect. 271 (d). It is there provided:

> "No patent owner *otherwise entitled to relief for infringement* • • • shall be denied relief or deemed guilty of misuse of illegal extension of the patent rights by reason of his having • • • (3) sought to enforce his patent rights against infringement or contributory infringement."[11] (Emphasis added.)

The argument is that since the mere bringing of a patent infringement suit is not a misuse, *a fortiori*, a suit on a voided license agreement is not itself a misuse (J.S. 24). This novel contention was advanced for the first time on USG's motion for a new trial and was disposed of by the trial Court's memorandum opinion of June 30, 1955 (J.S.A. 92-94). The Court, speaking of the statute, said:

> "The vital words for us • • • are 'otherwise entitled.' Patents are classical instruments in conspiracies and

11. This codification became effective January 1, 1953. Thereafter USG sued on its illegal agreements and for infringement.

combinations to violate the Sherman Act. Can it be where a designated misuse of patents—here patent license agreements—has been adjudged to be violative of that act that thereafter the patentee-licensor is absolutely protected by paragraph (d) (3) from the defense of misuse in recovering upon its adjudged unlawful agreements? Can it be possible that the Congress intended, by paragraph (d), to give to a patentee a protection superior to the broad public policy of the Sherman Act?"[12]

It answered its own questions by stating:

"We cannot believe that paragraph (d) was intended to or can properly be construed as nullifying the power of this Court to effectuate the purposes of an antitrust decree. In short, USG is not 'otherwise entitled' to come within paragraph (d) (3)."

No extended discussion is needed to demonstrate that Title 35, U.S.C. Sec. 271 (d) is inapposite to the present proceeding. From the face of the statute it is plain that the statute merely lays down the principle that a patentee *otherwise entitled to relief* is not guilty of misuse by merely enforcing his patent rights against *infringement or contributory infringement*. That, of course, is not what USG did in the proceedings brought against its licensees. Its infringement claim constituted only one of five or six counts. The statute is limited solely to enforcing "rights against infringement." A suit on a license agreement is on a contract; a suit for infringement is for a tort.[13] It was the suit on the voided license agreement which the

12. Inaccurately quoted by appellant at J. S. A. 94.

13. Compare *Carbice Corp.* v. *American Patent Development Corp.*, 283 U. S. 27, 33 (1931); *Faulkner* v. *Gibbs*, 199 F. 2d 635, 638 (9th Cir. 1952); *Lincoln Engineering Co.* v. *Stewart-Warner Corp.*, 91 F. 2d 757, 763 (7th Cir. 1937) *with Eclipse Bicycle Co.* v. *Farrow*, 199 U. S. 581, 586-88 (1905); *Sbicca-Del Mac, Inc.* v. *Milius Shoe Co.*, 145 F. 2d 389 (8th Cir. 1944); *Saco-Lowell Shops* v. *Reynolds*, 141 F. 2d 587, 596 (4th Cir. 1944).

lower Court primarily relied upon as showing continued misuse and consequently USG can get no comfort from the statute. It is further apparent from the fact of the statute that to have access to its provisions the patent owner must be "*otherwise entitled* to relief for infringement." As we have seen this Court has held that the patentee is not so entitled during a period while his patents are being used as instruments for monopoly and prior to purge, and consequently the statute cannot protect the infringement count. *E.g. Hartford-Empire Co.* v. *United States,* 323 U.S. 386, 419; *Mercoid Corp.* v. *Mid-Continent Investment Co,* 320 U.S. 661, 664-665 (1944); *B.B. Chemical* v. *Ellis,* 314 U.S. 495, 497-98 (1942).

Nowhere in its Jurisdictional Statement does USG attempt to make a showing that its patent misuse has been terminated nor in the Court below did USG attempt to meet its burden to introduce facts which would operate in law as a purge. Consequently, the District Court, using its "more flexible procedure" for the settlement of a decree (340 U.S. 76) acted well within the scope of its discretion in implementing the purpose of the Final Decree of May 15, 1951 by barring USG from recovery on its misused patents. *Besser Mfg. Co.* v. *United States,* 343 U.S. 444, 449 (1952); *International Salt Co.* v. *United States,* 332 U.S. 392, 400, 401 (1947); *United States* v. *National Lead Co.,* 332 U.S. 319, 334 (1947); *Associated Press* v. *United States,* 326 U.S. 1, 22 (1945); *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 185-187 (1944); *Chrysler Corp.* v. *United States,* 316 U.S. 556, 562 (1942).

Conclusion.

We respectfully submit, therefore, that it is manifest that USG presents no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

HERBERT W. HIRSH,
NORMAN A. MILLER,
Counsel for Certain-teed Products Corporation.

Of Counsel:
GANSON PURCELL.

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